SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 99

THE CINCINNATI GAS & ELECTRIC COMPANY AND THE CITY OF CINCINNATI, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-28) is reported at 389 F. 2d 272. The order of the Commission (Pet. App. 50-68) is reported at 37 FPC 209 and the decision of the presiding examiner (Pet. App. 30-49) at 37 FPC 221. The Commission's order denying rehearing (J.A. 538-542) is reported at 37 FPC 598.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29) was entered on February 16, 1968, and the petition for certiorari was filed on May 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission acted properly in permitting a wholesale gas purchaser to divert its entire future gas supply from its present supplier, on the basis of the Commission's determination that the new supplier will deliver gas at a substantially lower cost and that the over-all economic benefits to the consumers served by the purchaser outweigh the minor detriment to the existing supplier and its other customers.

STATEMENT

The City of Hamilton, Ohio (Hamilton), operates a natural gas distribution system. Prior to this proceeding, it obtained its entire gas supply from the Cincinnati Gas & Electric Company (CG&E). CG&E in turn obtained substantially all of its gas from Ohio Fuel Gas Company (Ohio Fuel) and Kentucky Gas Transmission Corporation (Pet. App. 20). On June 16, 1965, Hamilton applied to the Commission under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), for permission to purchase all of its requirements from Texas Gas Transmission Corporation

(Texas Gas) at the termination of its contract with CG&E.[1] Texas Gas correspondingly applied under Section 7(c) of the Act, 15 U.S.C. 717f(c), for authorization to build the facilities required to serve Hamilton. In addition, Ohio Fuel filed a competing application to serve Hamilton directly if the Commission found that CG&E should not continue to serve the load (Pet. App. 51-53).

The examiner found, and the Commission agreed, that it was in the public interest to permit Hamilton to switch its business to Texas Gas. The Commission found that under a Hamilton-Texas Gas contract, Hamilton and its customers would save approximately $2 million over a ten-year period because of Texas Gas' lower charges, and further found that the lower commodity rate offered by Texas Gas would enable Hamilton to generate additional industrial sales amounting to about 3.1 million Mcf annually, thereby substantially improving its load factor and further reducing the unit cost of purchased gas (Pet. App. 54-56).[2] The Commission also found that the lower-cost supply by Texas Gas would enable Hamilton to attract new industry (Pet. App. 56).

The Commission also, of course, considered the effects of the shift on Hamilton's suppliers. In the course of this inquiry, the Commission noted that sales to Hamilton constitute only 5% of CG&E's market, and that Hamilton is its only wholesale customer

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[1] The arrangement between Hamilton and CG&E was not regulated by the Commission (Pet. App. 52).

[2] The "load factor" is the ratio of average daily purchases for the year to contract entitlement.

(Pet. App. 53). The loss of the Hamilton sale would, at the rate proffered for its gas sales, reduce GC&E's gross revenues by only $12,002, over and above the cost of purchased gas. Moreover, these revenues were in fact $148,000 *short* of meeting CG&E's fully-distributed annual cost of supplying Hamilton (Pet. App. 58-59).[3] The Commission also found that CG&E would shortly make up for the loss of the Hamilton load by growth at better load factors (with a resulting reduction in the average cost of gas to CG&E),[4] and that the facilities CG&E claimed would be idled by the changeover would be utilized (except for some metering stations Hamilton had offered to buy) in serving two other growing communities nearby (Pet. App. 59, 60-61). Finally, the Commission determined that the cutback on Ohio Fuel would be small, with a reduction in fixed cost coverage of only $18,600 (Pet. App. 61) and that Ohio Fuel's competing proposal to

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[3] Petitioners suggest (Pet. 12-13) that the Commission erred in using the average cost of gas to arrive at these conclusions, rather than attributing to the Hamilton sale the cost of certain low-priced supplies CG&E sought to obtain from Texas Gas. The court below properly rejected this claim (Pet. App. 24), noting, *inter alia*, that the Commission's approach of rolling in gas costs reflected an appropriate regulatory inhibition against granting preferences to individual customers or classes of customers by a supplier's special allocation of low cost gas to them, rather than proportionally to all customers. See 15 U.S.C. 717c(b).

[4] The Commission found that while CG&E would experience a small short-term rise in its average cost of purchased gas in the first year—.04 cents per Mcf—CG&E's average purchased gas costs would, by 1969, decline by .13 cents per Mcf below the level that obtained with Hamilton connected (Pet. App. 59).

serve Hamilton was not nearly as sound and economical as service by Texas Gas promised to be (Pet. App. 61-62). In these circumstances the Commission approved the Hamilton-Texas Gas proposal. On review sought by CG&E, the City of Cincinnati, Ohio Fuel, and Kentucky Gas Transmission, the Court of Appeals for the Sixth Circuit affirmed (Pet. App. 19-29).

ARGUMENT

Petitioners in this Court raise objections to the Commission's order that reflect their disagreement with the significance attributed by the Commission to certain findings of fact. Under traditional standards governing the respective responsibilities of administrative agencies and reviewing courts, the Commission's evaluation of the relative consequences of the supplier switch, sustained by the court of appeals,[5] does not warrant further review. Cf. *Permian Basin Area Rate Cases* (Nos. 90 *et al.*, May 1, 1968) (slip op. p. 14).

1. In determining that Hamilton should be permitted to obtain gas from a different supplier, the Commission contrasted the benefits to Hamilton and its customers, with the consequences for the existing supplier, CG&E, and its suppliers and customers. This evaluation showed that even under the latest rate offer made by CG&E,[6] Hamilton would be able to reduce

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[5] The court below found that all of the Commission's findings were adequately supported by the evidence as a whole, and were thus conclusive (Pet. App. 28).

[6] Petitioners concede that CG&E would remain committed to this rate only until November 1, 1969 (Pet. 14).

its gas costs by a minimum of $2 million over a ten-year period as a result of buying at Texas Gas' lower rates. The record also showed that the lower cost of gas would permit three specific industrial sales which would raise Hamilton's load factor from 33 percent to an estimated 57 percent. As the Commission found, these factors would, in combination, reduce Hamilton's costs of purchased gas by at least 10 cents per Mcf. In addition, it was shown that the lower cost of the new supply of gas would enable Hamilton to attract new industry to an industrial park in the City. Hamilton, moreover, represented that the gas cost savings would be passed along in rate reductions (Pet. App. 55-56).

Petitioners no longer contest the sufficiency of the Commission's findings as to the existence or amount of the benefits to Hamilton and its customers; instead, they contend that the Commission failed to make a proper, relative evaluation of the likely harm to CG&E and its suppliers, and that an accurate evaluation would have revealed detriments to CG&E and its suppliers greater than the advantage to the City and its customers (Pet. 7-10). Petitioners assert that the Commission used one rule for Hamilton and another for CG&E (Pet. 7-8, 11-12) and that a so-called "revenue and expenses rule" should have been used to determine the detriment to CG&E and its suppliers as well as to determine the benefits to Hamilton. While the nature of this "rule", as well as the factual basis of the claim of a ten-year loss to CG&E of $2.4 million, is not completely clear (Pet. 12), petitioners seem to be insisting that in assessing the potential effects of

CG&E's loss of the Hamilton sale, the Commission should have ignored the facts showing (1) that it was an unprofitable sale, and (2) that growth from other customers would enable CG&E to make better utilization of existing facilities. *Supra*, pp. 3-4.[7]

Petitioners' objection (Pet. 8-9) to the Commission's reference to *Lynchburg Gas Co.* v. *Federal Power Commission*, 336 F. 2d 942 (C.A.D.C.), is misconceived. The Commission noted (Pet. App. 57) that in *Lynchburg* the court had held that it could not simply be assumed that the loss of a particular load would be injurious to a natural gas company or its customers, but rather the Commission must make the more meaningful inquiry whether the loss would actually operate to their substantial detriment.[8] This

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[7] In considering these factors, the Commission's calculations were based on CG&E's own figures, and all uncertainties in the predictions were resolved by giving CG&E the benefit of the doubt. Even so, the Commission found that the loss of Hamilton's business would result "in an actual savings by Cincinnati Gas of $155,000 annually." (Pet. App. 59.)

[8] In this respect, the court's *Lynchburg* decision represented merely an articulation of established Commission policy (see, *e.g.*, *Central Illinois Public Service Co.* v. *Panhandle Eastern Pipe Line Co.*, 4 FPC 1043, affirmed *sub nom. Kentucky Natural Gas Corporation* v. *Federal Power Commission*, 159 F. 2d 215 (C.A. 6); *Tennessee Gas Transmission Co.*, 14 FPC 544 and 635, affirmed *sub nom. Home Gas Co.* v. *Federal Power Commission*, 231 F. 2d 253 (C.A.D.C.), certiorari denied, 352 U.S. 831; *Shrewsbury Municipal Light Dept.* v. *New England Power Co.*, 32 FPC 373, affirmed *sub nom. New England Power Co.* v. *Federal Power Commission*, 349 F. 2d 258 (C.A. 1). Petitioners erroneously claim (Pet. 8) that *Shrewsbury* is inconsistent. There the Commission stated that the impact of Commission action on the existing supplier losing a load

is plainly a sound approach in certificate and rate cases alike. Of course, no single test of benefit or detriment can be followed mechanically, for the effect of a loss or gain of a load must necessarily be assessed in the particular context in which it arises. This is what the Commission, following its normal practice, did here in approving Hamilton's request to obtain gas from a new, substitute source.[9]

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had to be considered; the examiner's decision makes clear that the question of load replacement was canvassed, 32 FPC 373, 377, 396-397, just as it has been evaluated in this case, despite petitioners' protest (Pet. 15).

[9] Petitioners' assertion (Pet. 10-11) that the Commission has had a policy of protecting existing markets is inaccurate and certainly not supported by the two cases they cite. To be sure in both of those cases (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 219 F. 2d 729 (C.A. 3), certiorari denied, 349 U.S. 945, and *Home Gas Company* v. *Federal Power Commission*, 231 F. 2d 253 (C.A.D.C.), certiorari denied, 352 U.S. 831), the Commission's approval of a second supplier was not expected to displace existing supplies. Indeed, in *Panhandle*, the petition for review was dismissed for lack of aggrievement since Panhandle was seeking, in another proceeding, to reduce its own deliveries to the area involved. In *Home*, the Commission did limit the volumes to be sold by the new supplier, but the case (which cited with approval *Kentucky Natural, supra*, where, as here, the total substitution of a supplier had been authorized) did not reflect a policy of blindly protecting existing markets. Rather, it confirms that both the effect of loss of a sale on the supplier and the potential benefits to all the consumers affected are to be considered in each individual case.

In addition, petitioners italicize (Pet. 11) some language from the first *El Paso* case (*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660) in an attempt to suggest that competition is somehow more favored when its object is certification for incremental loads rather than for substitution for an existing supplier. Fuller analysis of that opinion, with

2. Petitioners make several subsidiary points which may be dealt with briefly. They complain (Pet. 13-15) that the court of appeals noted, as had the Commission, that there was doubt whether the Ohio Public Utility Commission had jurisdiction over the sale by CG&E to Hamilton. This issue has no bearing on the outcome of this case. Petitioners appear to concede that further litigation in the Ohio courts would be necessary to settle the point finally. But in any event the Commission decision does not rest on the eventual outcome of such a proceeding. At one time, CG&E urged that any certificate issued to Texas Gas and Hamilton should require that Hamilton obtain the Ohio Commission's approval of abandonment of the CG&E service (Pet. App. 65-66). The Commission properly rejected that suggestion, and petitioners are apparently not pressing it any longer. The question of state jurisdiction *vel non* bears only on the ability of Ohio to regulate the rates CG&E might demand after November 1, 1969 (the date beyond which the company is unwilling to guarantee that the rates proposed in its latest offer to Hamilton would not be increased). Since petitioners do not dispute that any

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even a cursory reading of the subsequent decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, makes clear that the Court was speaking of a frequently regrettable factual pattern and not endorsing discouragement of potential competition for existing markets. Indeed, the Court of Appeals for the Fourth Circuit has quite recently rejected a similar attempt to read that passage from *El Paso* as limiting competition to incremental sales. See *Atlantic Seaboard Corp.* v. *Federal Power Commission*, No. 11,404 (decided June 12, 1968).

change in these rates after November 1, 1969, would almost certainly be upward (Pet. 14), it is evident that the question of the Ohio Commission's jurisdiction has no significant bearing on the primary rationale of the Commission's decision—comparison of CG&E's offer with that of Texas Gas. If CG&E's rates were to increase because the latest rate offered to Hamilton was, as the Commission found, insufficient, the comparison would be even less favorable to CG&E.

Petitioners also argue (Pet. 15) that CG&E should be allowed to retain Hamilton in order that its "sales units would be increased and accordingly rates could be reduced." It is difficult to see how this could happen in view of the clear evidence, found adequate by the court below, that the Hamilton sale would result in an overall loss to CG&E. Besides, a concern with *general* rate reductions is difficult to reconcile with CG&E's often-expressed desire to allocate separately to Hamilton any large quantities of low-priced gas which it may acquire.

Petitioners deal briefly with the question of whether CG&E is a "middleman." They assert that middlemen are "a necessity—even where the 'factory' is close at hand, as in the case of Hamilton in its proximity to Texas Gas." (Pet. 16.) While intermediate gas pipelines perform valuable economic functions in some situations, the Commission's elimination of intermediaries where practicable has received consistent judicial approval. See *Kentucky Natural Gas Corp.* v. *Federal Power Commission, supra; New England Power Co.* v. *Federal Power Commission,* 349 F. 2d

258 (C.A. 1). Such a result is particularly sound when, as here, substantial economies are achieved with minimal detriment, if any, to the middleman or his suppliers or customers.

Finally, petitioners refer to the alleged impact of the Commission's decision on CG&E's suppliers, Ohio Fuel and Kentucky Gas Transmission. The Commission, however, found as a fact that the actual impact on them would be minimal and that the loss of volume would be quickly recouped (see Pet. App. 40-41). As the court of appeals noted, this finding, which largely follows from the findings as to CG&E's continued load growth, was fully supported (Pet. App. 28).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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